IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF OF HUGHES TRANSPORTATION, INC., AMICUS CURIAE

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STATEMENT OF INTEREST

Hughes Transportation, Inc., *amicus curiae*, is a carrier of explosives by motor vehicle. For a long time its principal activity has involved the transportation of military explosives for the United States, acting through the Department of the Army. A substantial

part of that activity has occurred on the public roads and highways in intrastate commerce between points within the Commonwealth of Kentucky. Such activity has at all times been subject to rate regulation by the Kentucky Department of Motor Transportation, an administrative agency of the Commonwealth of Kentucky.

Hughes Transportation, Inc. is Plaintiff in two suits against the United States pending before the United States Court of Claims (Case Nos. 525-52 and 208-54). The claims against the United States in those suits arise out of a dispute between the parties as to the lawful rates applicable to the shipments of explosives carried by Hughes between points within Kentucky. Hughes and the Commonwealth of Kentucky, an intervenor in such suits, contend in the Court of Claims cases that the lowest lawful rates applicable are those prescribed as minima for common carriers by motor vehicle by the Kentucky Department of Motor Transportation. The United States contends in such cases that the Commonwealth of Kentucky cannot constitutionally prescribe rates for such intrastate service to the United States at levels higher than rates agreed upon between the carrier and the United States.

In the course of the pending cases before the Court of Claims that Court decided, on motions by both parties for summary judgment, that the Kentucky authorities had authority to regulate and prescribe the Hughes rates for intrastate service to the United States. *Hughes Transportation, Inc.* v. *United States*, Ct. of Cl. No. 525-52, 121 F. Supp. 212 (1954). Further proceedings in the Court of Claims have been postponed pending decision by this Court in the instant case.

As an *amicus curiae* the interest of Hughes is confined to the question presented by the appellant California Commission as the "Ultimate Question", namely:

> Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?

Both parties have consented to the filing of this Brief as an *Amicus Curiae*. It is accordingly filed pursuant to rule 42(2) in support of the Appellant, Public Utilities Commission of the State of California.

SUMMARY OF ARGUMENT

I

The District Court's decision against the power of the State to regulate rates for intrastate transportation service to the United States is not based on any applicable prohibitory Constitutional or Federal statutory provisions. The Tenth Amendment preserves to the States the power of regulation of intrastate transportation services; and in the absence of appropriate specific Federal legislation there is no inherent conflict between such State rate regulation of intrastate services to the United States and the Constitutional powers and duties of the United States.

This Court has recognized that State regulation of intrastate motor carrjers rendering service to the United States does not interfere with the Federal Constitutional powers and duties. This Court has con-

sidered and rejected the arguments of the United States that State regulation of prices or rates for property or services to the United States violates any Constitutional immunity of the United States or conflicts with Federal procurement legislation. The relation between the United States as a shipper and a carrier ordinarily is the same as the relationship between private shippers and a carrier. Contracts between shippers and carrier cannot prevent the exercise of State regulatory authority.

II

Neither the Armed Services Procurement Act of 1947 nor the Federal Property and Administrative Services Act of 1949, purport to set aside or prohibit State regulation of prices or rates for property or services to the United States. They are consistent with the continued existence of such State regulation. The Federal Property and Administrative Services Act shows recognition by Congress of the authority of the States in this respect.

Section 22 of the Interstate Commerce Act is not applicable to intrastate motor carrier transportation. The express terms of the Motor Carrier Act preserve the intrastate regulatory authority of the States, and the Interstate Commerce Commission is specifically prohibited from regulating rates for intrastate motor carrier transportation.

ARGUMENT

I.

The States Have Power to Regulate Rates for Intrastate Motor Carrier Service to the United States

The District Court's decision below contains a lengthy recital of arguments and statements by military officers of the United States with respect to anticipated difficulties they expect from application of the State regulatory laws to intrastate transportation by carriers of property of the United States. But such decision contains little or no analysis of the basis for the District Court's action in holding such regulatory laws and the State action thereunder void as contravening the provisions of the Constitution of the United States. It is clear that the District Court's decision against such power of the State is based principally upon the bare conclusion that such regulation will interfere with the Constitutional powers of the United States to provide for an adequate military establishment. References by the District Court to certain Federal statutes in an attempt to support its conclusion on the constitutional question, are clear misapplications of such statutes to the intrastate service involved.

The striking down of State legislation and rate regulatory action applicable to intrastate carriers requires and merits something more than a mere general reference to the Constitutional powers of the United States. The fact that the services by the carriers may involve the property of the United States is not a significant Constitutional difference requiring by itself the prohibition of State rate regulatory action applicable to the carriers under such circumstances. In the absence of appropriate Federal legislation, implementing the Constitutional powers and duties of the United

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UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

JOINT BRIEF OF RAILROAD COMMISSION OF TEXAS, ATTORNEY GENERAL OF TEXAS, AND TEXAS INDEPENDENT MOTOR CARRIERS, AMICI CURIAE

STATEMENT OF INTEREST

Each of the parties to this brief is a co-petitioner before the Supreme Court of Texas in a cause there pending which involves the same constitutional issue presented by appellant as the "Ultimate Question" in this case, namely,

> "Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?"

(The opinion of the District Court in the instant case is published as *United States v. Public Utilities Commission*, 141 F. Supp. 168 (N.D. Cal. 1956).)

The Railroad Commission of Texas is a department of government of the State of Texas which, under the Texas Constitution and statutes, exercises broad authority to regulate rates and fares of Texas intrastate common carriers of property and passengers by rail and motor. Tex. Const. Ann. (Vernon 1955) Art. X, Sec. 2, Art. XVI, Sec. 30; Tex. Civ. Stat. Ann. (Vernon 1926) Arts. 6445, 6448, 6452, 6453, 6474(5), (Vernon 1945) Art. 4008, (Vernon 1953) Arts. 911b, 911a.*

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* All constitutional citations are to the Texas Constitution of 1876. All statutory references are according to the latest official revision of 1925. Since the State of Texas makes no current official publication either of the Constitution or of the Revised Statutes of 1925, references herein will be restricted to the most current unofficial publication. In every instance appropriate citation to official proclamations and official session laws are given in the unofficial publication referred to. The Railroad Commission's rate-making jurisdiction over intrastate

The Attorney General of Texas is the chief law officer of the State of Texas. By constitutional and statutory direction he is charged with the general responsibility of advising all State agencies and officers as well as representing them in civil litigation; the Attorney General is further charged with numerous specific law enforcement duties, including enforcement of laws regulating common carriers and common carrier rates, some of which duties he exercises only as legal counsel for the Railroad Commission and others of which he exercises independently. Tex. Const. Ann. (Vernon 1955). Art. IV, Sec. 22. *Compare* Tex. Civ. Stat. Ann. (Vernon 1926) Art. 6519, (Vernon 1945) Art. 4014, Tex. Pen. Code Ann. (Vernon 1953) Art. 1690a(b)(c) *with* Tex. Civ. Stat. Ann. (Vernon 1926) Arts. 6285, 6507, Tex. Pen. Code Ann. (Vernon 1953) Art. 1690b(b)(c)(h).

The motor carrier parties hereto, referred to collectively as "Texas Independent Motor Carriers,"* constitute a group of 57 motor common carriers each of which operates in intrastate commerce in Texas independent of railroad ownership and control. Each of these motor carriers operates between points in Texas under one or more certificates of public convenience and necessity issued by the Railroad Commission of Texas authorizing service either as a regular

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* The names of such carriers are listed in Appendix A.

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rail carriers has existed continuously since 1891, and its rate-making jurisdiction over intrastate motor carriers of property and of passengers has been in effect since 1929 and 1927, respectively.

route common carrier of general commodities or as an irregular route specialized motor carrier of liquids in bulk, automotive vehicles, household goods, or other commodities requiring special equipment for their loading, unloading and transportation over the highways. Many additional motor carriers operate in Texas under similar authority from the Railroad Commission, but the 57 Texas Independent Motor Carriers who are parties to this brief are the Texas motor carriers who have regularly competed, or who have attempted to compete, with Texas common carriers by railroad in rendering intrastate common carrier service in Texas for agencies of the United States.

For many years prior to 1938 the Railroad Commission of Texas prescribed and regulated rates for general application by Texas intrastate common carriers, rail and motor, irrespective of whether or not the carrier service was performed for agencies of the United States or for some other member of the shipping and receiving public. However, by a series of three opinions, the first of which was rendered in 1938, the Attorney General of Texas advised the Railroad Commission that the Railroad Commission's rate-making power could not be constitutionally construed to apply to intrastate common carrier service contracted for by agencies of the United States because, in the opinion of the Attorney General, intrastate common carriers rendering service under contracts with agencies of the United States rendered such service under an implied constitutional immunity from local rate regulation and also because, in the opinion of the Attorney General, assertion of state rate-mak-

ing jurisdiction over such contracts would conflict with federal procurement legislation.

On August 10, 1955, the Attorney General of Texas overruled his prior opinions and advised the Railroad Commission that the Texas statutes did confer authority upon that agency to regulate rates of carrier's moving traffic for agencies of the United States in Texas intrastate commerce and that the Texas statutes, so construed, were constitutional. On August 29, 1955, the Railroad Commission notified all railroads, motor carriers, express companies, and motor bus companies of the Attorney General's ruling and advised carriers who had done so to discontinue assessing and collecting rates different from those prescribed by the Railroad Commission. Thereafter, The Texas and Pacific Railway Company and 12 other intrastate rail carriers filed a declaratory judgment action in the 126th District Court of Travis County, Texas, against the Railroad Commission and the Attorney General of Texas. The United States intervened in support of the plaintiff railroads, and the Texas Independent Motor Carriers and some other Texas intrastate motor carriers intervened in support of the position of the Railroad Commission and the Attorney General.

Trial resulted in a broad declaration of law favorable to plaintiffs which is quoted and affirmed in the opinion of the intermediate Texas Court of Civil Appeals. *Railroad Commission v. United States*, 290 S.W. 2d 699 (Austin Civ. App. 1956, error granted). Both of the lower Texas courts grounded their declara-

tion on an interpretation of Texas statutes denying the authority of the Railroad Commission to regulate rates of common carriers who contract to serve agencies of the United States in Texas intrastate commerce.

By joint application for writ of error to the Supreme Court of Texas in its Docket No. A-5932, the Railroad Commission, the Attorney General and the Texas Independent Motor Carriers presented both the local law issue and the underlying constitutional issue by points of error in the following terms:

POINT I

The Court of Civil Appeals erred in holding that the statutes of the State of Texas do not authorize regulation of rates and fares contracted for and charged by common carriers in Texas for intrastate for-hire transportation service when such service is purchased by agencies of the United States.

POINT II

The Court of Civil Appeals erred in affirming the judgment of the trial court that "existing Federal Law" compels a construction of the statutes of Texas contrary to the plain meaning and declared purposes of said statutes because neither the Federal Constitution nor any Federal statute or discernible congressional policy prohibits regulation by the Railroad Commission of Texas of rates and fares contracted for and charged by common

carriers in Texas for intrastate for-hire transportation service when such service is purchased by agencies of the United States.

The United States and its co-respondent railroads replied to such application for writ of error, relying upon the same authorities and arguments concerning constitutionality that are advanced in the instant case. On November 7, 1956, the Supreme Court of Texas granted writ of error on both points presented in the application, thereby indicating its tentative opinion that the lower Texas courts had erred and that their judgments should be reversed. See Tex. Rules Civ. Pro., 483, 500; *Railroad Commission* v. *Jackson*, Tex. , 299 S.W. 2d 266 (1957). With the concurrence of all parties, further proceedings in the Supreme Court of Texas have been postponed pending this Court's decision in the instant appeal.

This brief is submitted in support of appellant, Public Utilities Commission of the State of California. On behalf of the Railroad Commission of Texas and the Attorney General of Texas it is filed pursuant to Rule 42(4); and, consent having been given by both parties to the appeal, it is filed on behalf of the Texas Independent Motor Carriers pursuant to Rule 42(2).

SUMMARY OF ARGUMENT

I

The judgment of the District Court, in holding that intrastate common carriers serving the military and

civil agencies of the Federal Government are immune by constitutional implication from state rate regulation, fails to recognize the fundamental distinction between the immune status of federal officers and federal agencies, on the one hand, and, on the other, the non-immune status of private contractors.

The District Court's wholehearted acceptance of the Government's allegations of impairment of national security and impairment of prompt service, as well as increased costs, which might result from intrastate rate regulation, is necessarily based on the wholly unfounded premise that state regulatory authorities are less to be trusted with classified information, and have less ability and motivation to devise safe, fast and flexible procedures, than various private individuals employed by the common carriers now favored with the bulk of Government traffic.

Until Congress provides otherwise, burdens on the Federal Government growing out of non-discriminatory intrastate common carrier rate regulation here challenged (as well as unchallenged burdens on the Federal Government growing out of non-discriminatory state regulation of carriers concerning certificates of convenience and necessity, safety of operations, etc.) are to be regarded as normal incidents of the federal system.

II

No Congressional act or policy precludes state regulation. The Armed Services Procurement Act of

1947, the Federal Property and Administrative Services Act of 1949, and the regulations promulgated thereunder by the Department of Defense and the General Services Administration do not prohibit state regulation but expressly recognize and accept local price regulation for local services. Other acts of Congress show that except where otherwise specifically provided Congress intends that federal agencies, as shippers, should pay the full commercial rate for common carrier service, and that Congress has followed a policy of recognition and respect for state and local rate regulation of common carriers.

ARGUMENT

I

NO EXPRESS OR IMPLIED CONSTITUTIONAL IMMUNITY

By its opinion, findings and conclusions the District Court takes the position that there exists an implied immunity from state regulation in favor of common carriers engaged in rendering intrastate transportation service for the military agencies of the United States, and that such immunity is to be implied from the terms of the Constitution itself which relate to national defense (Art. I, Sec. 8, Cls. 11, 12, 13, 16 and 17, and Art. IV, Sec. 3, Cl. 2). The District Court's judgment, however, enjoins the Commission generally from taking "any action" which would interfere with existing special arrangements with re-

spect to "rates for the transportation of property of the United States." The District Court's holding as to intrastate military traffic, and its further holding, if it be a holding, with respect to intrastate traffic handled for non-military agencies, can be rationally explained on but one basis, namely, that the District Court accepted without question plaintiff's basic theory that common carriers under contract with agencies of the United States are clothed with the constitutional immunities of the federal officer or agency with whom they contract.

In any event, the District Court failed to recognize the clear constitutional distinction between state regulation of local contractors who sell services or supplies to Government agencies on the one hand, and, on the other, attempted direct state regulation of governmental activities of officers, agencies and instrumentalities of the United States. The distinction is fundamental to a proper decision in this case, and the District Court's failure to properly classify the nature of the regulation imposed under Section 530, California Public Utilities Code, has caused rendition of an erroneous judgment that the Constitution itself makes invalid and void any local rate regulation of common carriers who contract to furnish intrastate carrier service for agencies of the United States. *Compare United States v. Baltimore & A.R.R.*, 308 U.S. 525 (1939), *Alabama v. King & Boozer*, 314 U.S. 1 (1941), *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943), *with McCulloch v. Maryland*, 4 Wheat, 316 (1819), *Johnson v. Maryland*, 254 U.S. 51 (1920).

The District Court's error of analysis is demonstrated by its consideration of the evidence as if Section 530 were directed against, and designed to directly regulate, contracting officers of the Federal Government, and only incidentally to regulate intrastate rates of common carriers (rather than the converse which plainly appears from the statute). The District Court's error of analysis is further demonstrated by its reliance upon cases concerning the subject of "undue burdens" on interstate commerce, such as *Morgan v. Virginia*, 328 U.S. 373 (1946), as furnishing standards defining the permissible extent to which states may properly regulate local activities, such as regulation of intrastate common carriage, which may indirectly affect federal officers and agencies in the performance of their duties. See *Johnson v. Maryland*, *supra*.

The Court's decisions in *United States v. Baltimore & A.R.R.*, *supra*, and *Penn Dairies, Inc. v. Milk Control Commission*, *supra*, clearly establish that neither the civil nor the war powers of the Constitution of themselves immunize Government transportation contractors from non-discriminatory local regulation traditionally exercised by the states over common carriers. Even the dissent in the *Penn Dairies* case accords with this view since the position of the dissenting justices was based not on the terms of the Constitution alone but on the Supremacy Clause and certain federal statutes and regulations construed by the dissenting justices to be inconsistent with the application to Government contractors of Pennsylvania's milk price regulation.

The reasons given by the District Court for refusing to apply the principles underlying this Court's decisions in the *Penn Dairies* and *Baltimore & A.R.R.* cases are without substance. With respect to alleged impairment of prompt service from "delays and increased administrative burdens," analysis of the evidence will convince the Court that these matters resolve themselves down to little more than cost factors. Further with respect to the District Court's reasoning that intrastate rate regulation of common carriers serving the Government might impair the national security and result in delays in transit, the Court will observe that such reasoning is necessarily based on two assumptions of the District Court which the parties hereto most earnestly challenge, namely: (1) that the responsible personnel of state regulatory authorities, who would "need to know" certain facts about the traffic to pass upon the reasonableness of a proposed rate, are less to be trusted with classified information than are various private individuals employed by the common carriers now moving such traffic who are necessarily required to make similar determinations; and (2) that state regulatory authorities lack the ability and motivation to work out safe, fast and flexible rate-making procedures for Government traffic moving by intrastate common carriers.

Finally, with regard to the District Court's attempted distinction concerning the direct or indirect nature of the regulation involved, the court will observe that the California regulatory system like many other state regulatory systems does include a general penal provision designed to require users of the regulated

transportation system, as well as carriers, to comply with the act and with lawful administrative rules and regulations thereunder.*

But such penal provisions do not even incidentally affect the manner in which the Government's property shall be moved *unless* the Government chooses to employ local common carriers. The United States may still transport its own property in any manner it sees fit without incurring any of the incidental burdens involved in the use of carriers for hire.

So long as it remains the policy of Congress that federal agencies, military and civil, shall primarily rely for intrastate transportation service not on their own transportation facilities but on the common carrier systems maintained and traditionally regulated in accordance with the transportation policies of the several states, and so long as Congress has not exercised its undoubted power to authorize federal agencies to contract for local transportation service without complying with local transportation regulations otherwise applicable in the state where the service is

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* See for example, Tex. Pen. Code Ann. (Vernon 1953) Art. 1690b(a)(b)(g)(h) and (i) which have been recognized by this Court as being part of a state transportation regulatory system designed to protect the integrity of common carrier rates and "to prevent through regulation unfair, discriminatory, or destructive competition between such authorized carriers as would ultimately impair their usefulness." *Steele v. General Mills, Inc.*, 329 U.S. 433, 440 (1947).

purchased (see Part II), it must be held that burdens on the national Government growing out of non-discriminatory intrastate common carrier rate regulation here challenged (as well as unchallenged burdens on the United States resulting from other non-discriminatory state regulation of local carriers concerning certificates and permits, safety of operations, etc.*) are to be regarded as normal incidents of the federal system.

II

NO CONGRESSIONAL ACT OR POLICY REQUIRES IMMUNITY

In 1943 this Court held in the *Penn Dairies* case that the existing military procurement statutes and regulations (318 U.S. at 272-273):

> "do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it 'impracticable to secure competition'."

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* *Cf. U.S.A.C. Transport, Inc. v. United States*, 203 F.2d 878 (10th Cir. 1952), *cert. denied*, 345 U.S. 997.

However, an entirely contrary interpretation of such statutes was expressed by the dissenting justices who were of the opinion that the "impracticable to secure competition" exception had no application and that the general provision for competitive bidding required that state-fixed prices otherwise applicable to local contractors be ignored in all instances involving contracts with the Army. Since the date of the *Penn Dairies* decision, and presumably with knowledge thereof, federal procurement legislation for the military and civil agencies and the administrative regulations thereunder have been rewritten so as not only to preserve in the same form and language the basic system considered by the Court in the *Penn Dairies* case but also to clarify beyond any reasonable doubt that Congress did not intend to override and set aside local price-fixing regulations.

The Armed Forces Procurement Act of 1947* undertook to "make uniform all the laws and rules covering purchase procedure for the armed services." Sen. Rep. No. 571, 80th Cong. 2nd Sess., U.S. Code Cong. Serv. (1948) 1049. Section 151 did not require competitive bids if "for supplies or services for which it is impractical to secure competition," or if "otherwise authorized by law." Senate Committee Report No. 571, *supra*, contains a full statement about the excep-

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* Act of Feb. 19, 1948, 62 Stat. 21, 41 U.S.C., 1952 ed., §§151-161. This Act, as amended in various immaterial respects, has been transferred to Title 10 of the Code by the Armed Forces Act of 1956. Act of Aug. 10, 1956, 70 Stat. 641, 10 U.S.C., 1952 ed., Supp. IV, §§ 2301-2314.

tional categories wherein negotiation was authorized and gives the following as illustrative of negotiation authority "otherwise authorized by law" (U.S. Code Cong. Serv. (1948) 1062):

> "Act of September 18, 1940 (54 Stat. 954, as amended by 59 Stat. 609; 49 U.S.C. 65), among other things this Act authorizes the procurement of transportation services without advertising *when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.*" (Emphasis added)

The statute referred to in the Senate Report is the same act which, reversing pre-existing federal transportation policy, also made the full commercial rates, fares and charges applicable to common carrier transportation of persons or property of the United States, including transportation by carriers engaged in interstate and foreign commerce (subject, of course, to valid reduced rates being negotiated by such interstate carriers under Sections 1(7) and 22 of the Interstate Commerce Act). See *United States v. Powell*, 330 U.S. 238, 241-242 (1947).

Under authority of the Armed Forces Procurement Act of 1947 administrative regulations were first published individually by the Army, Navy and Air Force; thereafter uniform regulations applicable to all branches were published by the General Services Administration and, after creation of the Department of Defense, by the Secretary of Defense. 32 C.F.R.

Ch. IV A, Part 400; 32 C.F.R. Subtitle A (effective Dec. 31, 1954). All of these regulations were substantially similar in their definition of conditions authorizing negotiation rather than competitive bidding within the meaning of the statutory authority relating to "supplies or services for which it is impractical to secure competition." The regulations promulgated by the Secretary of Defense are typical and include the following authorizations for negotiated contracts (32 C.F.R. Sec. 3.210):

> "(e) Where the contemplated procurement is for electric power or energy, gas (natural or manufactured), water, or other utility services;"
>
> "(j) When the contemplated procurement is for stevedoring, terminal, warehousing, or switching services, and when either the rates are established by law or regulation or the rates are so numerous or complex that it is impractical to set them forth in the formal specification for a formal solicitation of bids;"
>
> "(k) When the contemplated procurement is for commercial or air transportation, including time charters, space charters and voyage charters over trade routes not covered by common carriers (as to which, negotiation is authorized under the provisions of § 3.217 to 3.217-2 and Section 321 of Part III of the Interstate Commerce Act of September 18, 1940, 49 U.S. Code 65), and including services for the operation of Government-owned vehicles."

The Federal Property and Administrative Services Act of 1949* is for the most part concerned with procurement of services and supplies for the non-military agencies. Its terms with respect to competitive bidding and negotiation of contracts are for all practical purposes identical with the terms of the Armed Forces Procurement Act. 41 U.S.C., 1952 ed., § 252(c). Most pertinent for present purposes, however, is a provision of the 1949 Act applicable to both civil and military agencies whereby Congress authorized the Administrator of the General Services Administration "with respect to transportation and other public utility services" to represent all executive agencies (40 U.S.C., 1952 ed., § 481(a)(4):

> ". . . in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal *and State* regulatory bodies; provided, that the Secretary of Defense may from time to time, and unless the president shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this Subsection whenever he determines such exemption to be in the best interests of national security." (Emphasis added)

Effective October 2, 1954, the Secretary of Defense exercised the proviso power referred to,** and since

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* Act of June 30, 1949, 63 Stat. 378, 41 U.S.C., 1952 ed., § 251 et seq., 40 U.S.C., 1952 ed., § 471 et seq.

** 19 Fed. Reg. 6611 (Oct. 14, 1954)

that time the Secretary of Defense, or his representative, rather than the Administrator of the General Services Administration, has represented the Department of Defense in countless rate-making and other administrative proceedings before federal and state regulatory bodies as evidenced by "delegations of authority to represent" published in the Federal Register. In fact, the Secretary of Defense by appropriate delegation of authority from the Administrator of the General Services Administration often represents civil as well as military agencies. *E.g.*, 20 Fed. Reg. 3240 (May 12, 1955).

Thus, the language and history of existing procurement legislation as well as the administrative regulations published by those directly charged with execution of such laws are entirely consistent with state regulation of rates of intrastate common carriers who contract to serve both military and civil agencies of the United States. Moreover, such a construction of existing procurement legislation is, while the District Court's interpretation is not, compatible with modern Congressional policies that have made the United States as a user of common carrier services subject to payment of the full commercial rate, including services by interstate common carriers when not rendered under a specific free or reduced rate provision of the Interstate Commerce Act. *See United States v. Powell, supra; Baggett Transportation Co.*

— *Petition For Exemption — Transportation For U.S. Government*, No. MC-C-1419, I.C.C. Div. 2, 9 Fed. Car. Cas. 742 (C.C.H. 1953). Likewise, such a construction of existing procurement legislation is, while the District Court's interpretation is not, compatible with the recognition and respect shown by Congress for state and local rate regulation of common carriers even while exercising its war powers during time of war. See Emergency Price Control Act of 1942 § 302(c), 50 U.S.C.A. Appendix § 942(c) (" . . . Provided, that nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility . . .); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 149-152 (1943).

Had Congress intended that contracts for local transportation services for agencies of the United States be exempt from state rate regulation, "it would unquestionably have expressed such intention in language whose meaning would be clear." See *Reagan v. Mercantile Trust Co.*, 154 U.S. 413, 417 (1894). The District Court erred in holding otherwise.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed.

Respectfully submitted,

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Austin, Texas

CERTIFICATE OF SERVICE

We, J. W. Wheeler and Phillip Robinson, attorneys for the Railroad Commission and Attorney General of Texas and the Texas Independent Motor Carriers, respectively, amici curiae herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on this ..... day of October, 1957, we served copies of this brief on The Solicitor General, the attorneys who represented the United States in the District Court, and the appellant by mailing the same, properly addressed, air mail postage prepaid.

J. W. WHEELER

PHILLIP ROBINSON

APPENDIX A

NAMES OF TEXAS INDEPENDENT MOTOR CARRIERS

Alamo Express, Inc.; Alamo Motor Lines, a corporation; Arledge Transport Co., Inc.; Associated Transport, a corporation; Tom Aycock, doing business as Tom Aycock Transport Company; Basse Truck Lines, Inc.; Brown Express, a corporation; Bulldog Transport Company, a corporation; Cactus Transport, a corporation; Caddell Transit Corporation, a corporation; Aaron Carthel, an individual; Central Forwarding Inc.; Central Freight Lines Inc.; Chemical Transports, Inc.; Cody and Teague Transport, Inc.; E. R. Compton, W. S. Compton and Mrs. M. D. Compton, doing business as Compton Transport Company; H. C. Denson, doing business as H. C. Denson Trucking Company; East Texas Motor Freight Lines, a corporation; Ferguson-Steere Transport, a corporation; B. R. Gamblin, et al, doing business as Oil Transport Company; Thomas Graves, doing business as Thomas Graves Transport; Charles Herder, Jr., doing business as Herder Truck Lines; R. T. Herrin, an individual; John L. Hill, John L. Hill, Jr., and Laveren Collum, doing business as Hill Bros. Fuel Oil Company; Houston and North Texas Motor Freight Lines, Inc;

Mrs. Willie R. Hudson, doing business as Hudson Brothers; D. H. Jefferies, Inc.; Glen P. Mabry and

T. A. Panick, doing business as Air Speed Oil Company; Merchants Fast Motor Lines, Inc.; L. F. and F. D. Miller, doing business as Miller & Miller Motor Freight Lines; H. C. Morris and W. P. Price, doing business as M & P Transport Company; J. M. Rabon, doing business as Rabon Transport Company; Red Arrow Freight Lines, Inc.; Red Ball Motor Freight, Inc.; Robertson Auto Transport Company, a corporation; Robertson Transports, Inc.; Ray Rollen and T. L. Rollen, doing business as C & R Transport Company; E. W. Schenecker and J. R. Boswell, doing business as Commercial Oil Transport; Sellars Oil Transports, Inc.; E. P. Shaw, doing business as Shaw Transports; B. B. Slimp and F. A. Slimp, doing business as Highland Transport Company; Ray Smith Transport Co., a corporation; Snowden Transport Co., a corporation; Southern-Plaza Express, Inc.; Southwestern Motor Transport, Inc.; Sunset Motor Lines, a corporation; Tank Lines, Inc.; The Transport Company of Texas, a corporation; Triple "A" Transport Company, a corporation; Art Tucker, doing business as Art Tucker Transports;

Union Transports, Inc.; Western Oil Transportation Co., Inc.; Western Petroleum Transport Corp.; J. T. Whitehurst and Garland Clymore, doing business as Coastal Transport Company; Robert P. York, doing business as York Transport Company; Mrs. Bess F. Young, doing business as Young's Motor Freight Lines; and Younger Bros. Inc.